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NPIC/TDS/11-1150-67  
21 November 1967

MEMORANDUM FOR: Chief, Procurement Division, OL

ATTENTION: Chief, [REDACTED]

THROUGH: Chief, Support Staff, NPIC

SUBJECT: Contract [REDACTED]

REFERENCES: (a) Contract [REDACTED]  
(b) Amendment No. 1 to Contract [REDACTED]

1. The subject contract, reference (a), is for the fabrication of an Advanced Rear Projection Viewer. The basic contract dated 31 May 1967 was negotiated by [REDACTED] (West Coast Procurement Office) with extensive participation and assistance by the NPIC-Technical Development Staff. This contract, while executed by [REDACTED] was apparently in-part unacceptable to them and was signed conditionally with reservations as to certain terms. Reference (b) substantially alters the terms of the original agreement.

2. Although NPIC was made aware that the cost allocation of the original document was to be amended, there was no indication that the amount of fixed costs to be amortized over the first 10 units would be substantially varied or that the warranty as originally drafted would be so radically changed. This document expresses NPIC's position regarding these changes as verbally communicated to [REDACTED] in telephone conversations of 2 and 6 November 1967.

3. The original negotiation allowed approximately [REDACTED] of costs common to the subject viewer and a previously developed instrument to be amortized over the first ten units produced; therefore, one tenth or approximately [REDACTED] was to be an allowable cost under this contract. Reference (b) indicates that portions of [REDACTED] will be allowed to be recovered. The amendment makes no reference as to what portion of this total will be allowable. The difference [REDACTED] between the [REDACTED] and the originally allowed [REDACTED] was alleged to have been incurred when [REDACTED] investigated the feasibility of extending their existing zoom optical system to satisfy NPIC's technical specifications. First, it is questioned why these costs are so large in relation to the work accomplished. NPIC is purchasing a complete lens design (the Phase I effort of this contract) for a total cost of [REDACTED] (NPIC's share is [REDACTED]). Certainly, the complete lens design and feasibility investigation of the subject contract is considerably

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more extensive and costly than the relatively simple and straightforward analysis that [REDACTED] performed before the execution of this contract. Second, it is questioned why these costs are directly chargeable and partially recoverable under this contract. Efforts such as these (seemingly a proposal revision) are normally charged to a general overhead account. Third, it is not completely clear how these costs will be allocated (what portion of these costs will be allowed) if the contract is terminated prior to completion.

4. There are a number of changes in the originally drafted warranty which require analysis. Paragraph 7a of reference (b) states that [REDACTED] warrants the items to be free from defect in material and workmanship and will substantially conform to applicable specifications... First, this new clause completely eliminates the originally included design from these items covered by the warranty. Second, and most important, the clause allows the Contractor to allege substantial performance where there is non-compliance with any of the specific contractual technical performance specifications. The reason [REDACTED] undertook to investigate using their existing zoom optical system (and supposedly incurring a cost of [REDACTED]) was to see how closely they could satisfy the original technical specifications. After an analysis of the results of this study by NPIC, a conclusion was reached that the technical specifications could not be compromised to the point to permit [REDACTED] to extend their existing optical system to satisfy this program. NPIC's position that the contractual specifications were the minimum acceptable was thoroughly and explicitly communicated to [REDACTED] in subsequent negotiations. These specifications are the minimum that will allow the instrument to be used for the particular purpose that NPIC anticipates. Because the Contractor does not have the clearance to know the characteristics of that particular purpose, NPIC must rely upon complete, and not substantial, compliance with the technical specifications (for this reason the exclusion in Paragraph 7f of an express or implied warranty for fitness for a particular purpose is not objectionable). However, to avoid a serious potential conflict, complete and total compliance with the technical specification is strongly recommended.

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5. There seems to be a conflict between the warranty period as outlined in Paragraphs 7b and 7c. In addition, Paragraph 7b seems to put the burden of proof on the Government to show that any defective or non-conforming part existed at the time of delivery. From a practical viewpoint, this seems to be a very large burden of proof for NPIC to bare.

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6. Paragraph 7c suggests a warranty period of 30 days after delivery, installation and final acceptance testing of the viewer at the Sponsor's facility. Because each of these events is separate with respect to time, the warranty period must only start to run after the final acceptance at the Sponsor's facility and should be so defined.

7. As NPIC interprets Paragraph 7d, after the warranty begins to run it continues except as to those parts which fail before the warranty expires and the running of the warranty is suspended only with respect to those parts which do fail. First of a kind equipments, such as this viewer, generally experience minor failure during the first operational periods. It can be easily hypothesized that a simple part could fail which would essentially render the complete viewer unusable. Experience dictates that such failures do occur and take substantial time to rectify; as a consequence, the warranty would effectively expire for the complete instrument while waiting for delivery of a single replacement part. It is strongly recommended that steps be taken to correct this deficiency in the warranty.

8. Paragraph 7e makes no reference to whom the warranty excludes because of misuse, neglect or accident. Conceivably, the Government could be liable for a carrier's (shipper's) misuse, negligence or accidents.

9. Paragraph 7f specifically excludes other express or implied warranties including those implied warranties of merchantability and fitness for a particular purpose. Although NPIC does not expect to hold [redacted] liable for fabricating the viewer to satisfy the particular purpose for which NPIC expects to use the viewer, there is seemingly no reason why they should not be held to the merchantability standards of Section 2-314, Article 2, of the Uniform Commercial Code for compliance with the criteria of being "fit for the ordinary purpose" (that being film viewing) for which rear projection viewers are used including those warranties (which) arise from (the) course of dealing or usage of (the) trade. As outlined above, the specifications for the particular purpose are covered by the technical specifications incorporated in the contract; but, many minor details of rear projection viewers in general are not specifically enumerated by these specifications and would be reasonably protected by the merchantability standards of being fit for its ordinary purpose.

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10. It is recommended that action be taken to rectify the above mentioned contractual deficiencies to insure a higher probability of delivery of a successful instrument. Specifically, (1) the specific amount or percentage of the costs to be amortized over this contract should be stated in the contract and (2) the warranty should not exclude the merchantability standards

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and should clarify the other ambiguities as discussed above. Of most importance should be the substitution of 'complete and total' for the 'substantial performance clause' and the suspension of the running of the warranty as to the total viewer when the viewer is inoperable because of defective parts.

[REDACTED]

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Colonel, USAF  
Assistant for Technical Development, NPIC

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X1 NPIC/TDS/DS [REDACTED]

[REDACTED] (21 Nov 67)

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